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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

HENRY HENKEL, CAROLINE HENKEL, George Henkel, William Henkel, Lizzie Henkel, and Mamie Henkel, plaintiffs in error,
v.
THE UNITED STATES.
No. 142.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is here on a writ of error to the Ninth Circuit Court of Appeals to review a decision of that court, rendered May 6, 1912 (196 Fed. 345; R. 50–52), affirming a judgment in ejectment rendered on the pleadings in favor of the United States by the United States District Court for the District of Montana on December 22, 1911 (R. 30–35). The question presented is whether the United States is, or the plaintiffs in error are, entitled to the 800 acres of land sued for.

The fact averments are meager, but the court will judicially notice the essential Indian history and also, we think, the departmental action of the Government as to the extensive national irrigation works provided for by the reclamation act of 1902, just as it has noticed like action as to transcontinental railroads built under authority of acts of Congress. Appreciation of the following material facts thus developed is essential to a comprehension of the questions involved.

HISTORY AND STATUTES.

The Piegan Tribe is part of the Blackfeet Nation, located on the Blackfeet Indian Reservation, the boundaries of which were first defined by the Fort Laramie treaty, concluded *September 17, 1851*, but never ratified. The treaty of *October 17, 1855* (11 Stat. 657), somewhat modified its boundaries.

The act of *April 15, 1874* (18 Stat. 28), created a new reservation for the Piegan and other tribes. This reservation was reduced, and the reduced area divided into separate reservations, by an agreement executed December, 1886, and January, 1887 (25 Stat. 113), approved *May 1, 1888* (25 Stat. 133). One of these reservations was set apart for the "Indians now attached to and drawing rations at the Blackfeet Agency," they being the "Piegan, Blood, and Blackfeet Nation" (p. 129). The last of ten annual payments for lands ceded by that agreement fell due May 1, 1898 (Art. III, p. 114). Right of way through every portion of each new

reservation for railroads, highways, or telegraph lines was granted (Art. III, p. 115).

The allotment act of *February 8, 1887* (24 Stat. 388), as amended *February 28, 1891* (26 Stat. 794), empowered the President, as to any reservation which he should consider advantageous for agricultural or grazing purposes, to allot, after survey thereof, "to each Indian located thereon one-eighth of a section of land"; and if the lands allotted were *only valuable* for grazing purposes to allot to each a quarter section. It further provided (sec. 2) that "all allotments set apart under the provisions of this act shall be selected by the Indians, *heads of families selecting for their* minor children * * * and in such manner as to embrace the improvements of the Indians making the selection." Section 5 provided:

> That upon the approval of the allotments * * * by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall * * * declare that the United States does and will hold the land thus allotted for the period of 25 years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs * * *. And if any conveyance shall be made *of the lands set apart and allotted* as herein provided, or any contract made touching *the same*, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void.

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Section 10 provided:

> That nothing in this act contained shall be so construed as to affect the * * * power of Congress to grant the right of way through any lands granted to an Indian * * * for railroads, or other highways or telegraph lines for the public use, *or to condemn such lands to public uses upon making just compensation.*

Plaintiffs in error constitute a family consisting of a white father, a Piegan Indian mother, and their four children; all of whom, save the father, have always been members of the Piegan Tribe.

Before May, 1901, the *whole family* settled on the lands described in the answer, and has ever since occupied them as a home. These lands have been grazing lands, so classified by the Government (R. 24). There is no averment that they were *only valuable* therefor.

On *September 28, 1895*, a new agreement was made (28 Stat. 353) approved by act of *June 10, 1896* (29 Stat. 357), Article V whereof (p. 355) provided:

> Since the situation of the Blackfeet Reservation renders it wholly unfit for agriculture, and since these Indians have shown within the past four years that they can successfully raise horned cattle, and there is every probability that they will become self-supporting by attention to this industry, it is agreed that, *during the existence of this agreement, no allotments of land in severalty shall be made to them*, but that this whole reservation shall continue to be held by these Indians as a communal

grazing tract upon which their herds may feed undisturbed; and that *after the expiration of this agreement, the lands shall continue to be held*, until such time as a majority of the adult males of the tribe shall request in writing that allotment in severalty shall be made of their lands: *Provided*, That *any member of the tribe* may, with the approval of the agent in charge, *fence in such area of land as he and the members of his family would be entitled* to under the allotment act; and may file with the agent a description of such land and of the improvements *that he has* made on the same, and the filing of such description shall give the *said members of the tribe the right to take* such land when allotments of the land in severalty shall be made.

Article VII (p. 356) provided:

It is further agreed that whenever, in the opinion of the President, *the public interests require the construction of* railroads, or other highways, telegraph or telephone lines, *canals* and irrigating ditches, *through any portion* of this reservation, right of way shall be, and is hereby, granted for such purposes, under such rules, regulations, limitations, and restrictions, as the Secretary of the Interior may prescribe; the compensation to be fixed by said Secretary and by him expended for the benefit of the Indians.

By virtue of the payment clause (Art. II, p. 354), this agreement endured until May 1, 1908, at least.

The Reclamation Act of *June 17, 1902* (32 Stat. 388), provided for—

> the examination and survey for and construction and maintenance of irrigation works for the storage, diversion, and development of water for the reclamation of arid and semi-arid lands.

The whole work was to be conducted by the Secretary of the Interior. Section 7 provided:

> That *where*, in carrying out the provisions of this act, *it becomes necessary to acquire any rights or property* the Secretary of the Interior is hereby authorized *to acquire the same for the United States* by purchase or by condemnation, etc.

And section 10 provided:

> The Secretary of the Interior is hereby authorized to perform *any and all acts* * * * necessary and proper for the purpose of carrying the provisions of this act into * * * effect.

By act of *June 21, 1906* (34 Stat. 327), it was provided:

> That any Indian, *allotted lands* under any law or treaty without the power of alienation, and within a reclamation project approved by the Secretary of the Interior, *may sell and convey any part thereof under rules and regulations prescribed by the Secretary of the Interior;* but such conveyance shall be subject to his approval, and when so approved shall convey full title to the purchaser, the same as if final patent without restrictions had been issued to the allottee.

In *1902* preliminary surveys of the Milk River project were begun by the Reclamation Service, which outlined the boundaries of the St. Marys Dam and its right of way for flooding area. These boundaries were finally established by the report of the Board of Engineers, dated September 19, 1904.

On *February 28, 1903*, the Secretary of the Interior, upon recommendation of the director of the service, dated December 20, 1902, withdrew, under the terms of the act, a strip of land one-half mile wide around lower St. Marys Lake and on each side of the river, as necessary for project purposes. (Copies of this recommendation and order are attached as Appendix A.)

On *March 14, 1903*, the Secretary conditionally authorized construction. On *March 25, 1905*, he finally authorized construction.

On July 27, 1906, construction was begun, 17.1 per cent of the St. Marys unit and 19.3 per cent of the entire project being completed by June 30, 1913, the work having been delayed by the necessity of negotiating with Great Britain the treaty of January 11, 1909. Over $1,600,000 had been theretofore expended on the work. (*12th Ann. Rep. Recl. Serv. 1912–13*, pp. 128, 129, 134.)

By act of *June 25, 1910* (36 Stat. 858), it was provided:

> SEC. 13. That the Secretary of the Interior * * * is hereby authorized * * * to reserve from location, entry, sale, allotment, or other appropriation, any lands within any

> Indian reservation * * * which may be necessary for use in connection with any irrigation project heretofore or hereafter to be authorized by Congress.

On *September 15, 1911*, after survey of the lands, and pursuant to the recommendation of the Director the Secretary made his second withdrawal in conformity to the survey, by order covering all this land. (Copies of this recommendation and order are attached hereto as Appendix B.)

On November 5, 1906, having determined this land to be, as in fact it was, necessary for the project, there was secured a written offer, signed by the boys and the mother (for herself and the girls), and concurred in by the father, to relinquish all claims and rights to said land and improvements, for $7,500. This sum was paid to the mother (according to the answer), or to all (according to the complaint), on February 15, 1907, whereupon a writing, similarly executed and purporting to relinquish these rights and claims to the United States, was delivered to and approved by the Secretary of the Interior.

By act of *March 4, 1907* (34 Stat. 1035), the Secretary was directed to survey the whole reservation, and to cause allotments of 40 acres of irrigable and 280 acres additional of grazing land for each Indian to be made in trust, according to the general allotment law, with provision for an irrigation system similarly held, which might be enlarged *for the benefit of others than the Indians;* and it further provided for the

settlement and sale of unallotted lands, with this significant provision:

> That if, after the approval of the classification and appraisement (of the unallotted lands), * * * *there shall be found within the limits of the reservation, under irrigation projects deemed practicable under the provisions of the act of Congress approved June 17, 1902, known as the reclamation act*, said lands shall be subject to withdrawal and be disposed of under the provisions of said act (p. 1037).

These questions arise:

1. Was either tribal or personal relinquishment of this land necessary to authorize its use by the United States for this project?
2. Had not the tribe granted a right to so use it?
3. Had the Henkels any individual interest in this land?
4. Had the Henkels power to relinquish?
5. Had the Government the power to take?
6. Did the daughters in fact relinquish?
7. The improvements?

ARGUMENT.

I.

HAVING THE FEE TITLE AS ORIGINAL PROPRIETOR, THE GOVERNMENT COULD, AND DID LAWFULLY, APPROPRIATE THIS LAND TO ITS MILK RIVER RECLAMATION PROJECT.

In this branch of the argument we treat the case as if no negotiations had been had with, and no money paid to, any of the Henkels; and as if the tribal agreement of September 26, 1895 (29 Stat. 355), granting right of way for "canals" through the reservation,

had never been made. Even under such circumstances we insist the Government would have the power, because it was the original proprietor in fee, to appropriate these lands to its own national uses (subject only to a *moral* obligation to compensate the tribe), just as it might have so appropriated any other of its public land lying without the reservation. We further insist that it did so appropriate them in this case. These contentions rest upon the following considerations:

1. The "Indian title" is a mere right of occupancy. The ultimate fee is in the United States.

In *Johnson* v. *McIntosh*, 8 Wheat. 543, 585, this court said:

> It has never been doubted that either the United States, or the several States, *had a clear title* to all the lands * * * subject only to the Indian right of occupancy, etc.

In *Jones* v. *Meehan*, 175 U. S. 8, this court said:

> Undoubtedly the right of the Indian nations or tribes to *their* lands * * * was a right of possession or occupancy only; the *ultimate title in fee* in those lands *was in the United States*, etc.

In *Caldwell* v. *Robinson*, 59 Fed. 653, the court said:

> * * * the country was *claimed under an absolute title* by the Governments of France and Spain. *Their title* passed to the United States * * *. The *only right* ever conceded to the Indians *was* that of *occupancy*, etc.

In accordance with this principle, Congress, in the act of March 3, 1871 (16 Stat. 566), provided—

> that hereafter no Indian nation or tribe * * * shall be acknowledged or recognized as an independent nation, with whom the United States may contract by treaty, etc.

Thereafter agreements, instead of treaties, were made. And in late years, even that formality was dispensed with. *United States* v. *Kagama*, 118 U. S. 379; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294. Indeed, the very act providing for the opening of this reservation is an example of this. For, although the agreement of 1895 provided that there should be no allotments during its existence (at least until May, *1908*), nor thereafter until requested in writing by a majority of the adult males, Congress in disregard thereof, by act of March 4, 1907 (34 Stat. 1035), provided for allotment of the reservation, and white settlement and sale of the residue.

2. The individual Indian had no interest in any land.

He enjoyed occupancy through tribal membership. This did not give him any interest whatever, as an individual, in the land occupied. He had neither an alienable nor descendible right, nor one that could be seized on attachment, nor sold on execution.

In *Sizemore* v. *Brady*, 235 U. S. 441, 446, this court said:

> *The right of each individual* to participate in the enjoyment of such property *depended upon tribal membership; and when that was terminated, by death or otherwise, the right was at an end. It was neither alienable nor descendible.*

The right of occupancy being a tribal right, inhering in the tribe alone, it could only be ceded or surrendered by the latter. And it was an essential principle of "title by discovery," that the tribe could only surrender its occupancy right, *to*, or by the consent of, the United States.

In *Jones* v. *Meehan*, *supra*, this court said:

> And the Indian title could not be conveyed to anyone *but the United States*, without the consent of the United States. *Johnson* v. *McIntosh*, 8 Wheat. 543; *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17; *Worcester* v. *Georgia*, 6 Pet. 515, 544; *Doe* v. *Wilson*, 23 How. 457, 463; *United States* v. *Cook*, 19 Wall. 591; *United States* v. *Kagama*, 118 U. S. 375, 381; *Butz* v. *Northern Pacific Railroad*, 119 U. S. 55, 67. See also 22 Op. Atty. Genl. 232, 234.

Plaintiffs in error in their brief themselves advance this contention, in the following language (p. 23):

> The right of occupancy of the *whole* reservation is in *all* the Indians subject to such allotment right or rights of temporary possession as the law may accord to individual Indians. The rights of the Indians as a whole must be acquired. (Italics theirs.)

3. Tribal assent not necessary.

These lands were public lands held in fee by the United States. While Congress has always recognized the tribal occupancy, and has placed the proceeds of lands thrown open to settlement within reservations to the credit of the tribe, it has again and again thrown them open to white settlement without any agreement with the tribe. In so doing it necessarily disposed of the tribal right of occupancy, without the assent of the Indians. Tribal assent is not an essential to the exercise by Congress, of the power of primary disposal. In *United States* v. *Alaska Packers Assn.*, 79 Fed. 152, 156, the court said:

> The Government of the United States does not deraign title to its public lands from the Indians. The National Government is the primary source of title, and, *as original proprietor, it had the power to dispose of public lands, even within an Indian reservation, without the consent of the Indians.*

Plaintiffs in error concede the power of the United States in this regard in the following language (their brief, pp. 17–18):

> The Government may undoubtedly devote the lands within an Indian reservation to any purpose it may see fit * * *. Though it *might* have opened the reservation to settlement without the consent of the Indians, it did not do so.

4. The United States had lawfully appropriated this land to this use.

Plaintiffs in error, while granting its power, deny that it ever authorized this appropriation. They insist (brief, pp. 17–28) (1) that the Government may take, but only for reservation uses; (2) that section 7 of the reclamation act does not authorize it because (*a*) it is not applicable to reservations; (*b*) so construed it would violate "treaty" with the Indians and repeal the prohibition of the Allotment Act; (*c*) that the right before actual allotment is a tribal right, and has never been acquired; and (*d*) that section 13 of the act of 1910 does not apply to lands in which an "inchoate right of selection" has attached. We consider these questions.

(*a*) *The power to take is not limited to "reservation uses."*

Granting that the power exists apart from the Reclamation Act, they limit that phase of the power arbitrarily to lands *outside of reservations.* There is no justification for so limiting the general power (see cases pp. 10 and 11 supra).

(*b*) *Reclamation Act applies to reservations.*

This act authorizes and directs the Secretary "to make examinations and surveys for, and to locate and construct" national irrigation works, with special powers, among others, to—

> withdraw from public entry the lands required for any irrigation works (and) * * *

> where * * * it becomes necessary, to *acquire any rights or property* * * * to acquire the same for the United States by purchase or condemnation, etc.—

and with the general power—

> to perform *any and all acts* and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into * * * effect.

These national works were to be built in 16 named States and Territories, where were located not only the arid lands but also *practically all the Indian reservations.* Public lands were to be used as needed, and outstanding private rights were to be secured by purchase or condemnation. It would be difficult to frame language giving more ample authority. He must examine, locate, and construct. He is to acquire any rights or property necessary therefor by purchase or condemnation, at his discretion. And, lest he still lack power to act under any peculiar condition that might arise, he is authorized to perform *any and all acts* necessary, etc., to carry the act into effect. No exception can be found as to the nature of the land, quality or quantity of title or claim, or the condition of the persons enjoying the same. The act was general and framed to meet all conditions. More than 100,000 square miles of the region subject to its operation was possessed by tribes or individual Indians. In some reservation where allotments had been made there were lands then open to white settlement. During the years required to complete these

large projects these conditions would be extended. Broad as is the language, equally broad are the reasons for not narrowing its meaning. To do so would be to block reclamation of all arid lands—though *outside* of reservations—so situated as that their irrigation works must cross reservation public lands held in tribal or individual occupancy. It is inconceivable that Congress overlooked the palpable need for so crossing; in fact, it treated with canals with regard to waters to be produced only by this project, and otherwise considered it. There would be real difficulty in so reading the act, while there is none in reading it otherwise.

In *United States* v. *Freemen*, 3 How. 556, 565, the court said:

> The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed, etc.

In *Jones* v. *Guaranty Co.*, 101 U. S. 626, of a statute providing for securing debts "*contracted*" by mortgage, the court refused to adopt a construction forbidding a mortgage for future advances, saying:

> This we think is too narrow a construction of the language of the law. * * * The intent of the lawmaker is the law.

See also *Thompson* v. *New York*, 3 Sandf. Ch. 625; *Flint* v. *Marine Ins. Co.*, 71 Fed. 210; *Pierce* v. *Van Dusen* (C. C. A.), 78 Fed. 693, 696; *The Annie S. Cooper*, 48 Fed. 703.

That Congress itself regarded the Reclamation Act as operative within reservations is demonstrated by the act of 1907, opening this very reservation, in that it provides for withdrawal of excess lands after allotment "found within the limits of the *reservation under irrigation projects.*" No such construction work could ever be projected or exist, if the other reading were correct.

A uniform administrative interpretation has been given by operating, as well within as without reservations, under the Reclamation Act from the very beginning.

Such a reading of section 7 does not violate any (treaty) agreement, because seven years before the passage of the act, and in 1895, the tribe had already granted rights of way for "canals" anywhere on the reservation. (This will be further considered infra.) If it did oppose the agreement, such action would be entirely within the power of Congress. Indeed, the very act that threw open this reservation opposed the same agreement of 1895, which agreed that the same should be held as a "communal grazing tract" until such time, after 1908, as the adult males should in writing request allotment.

We *agree*—and indeed have already argued—that the claim of the Henkels was not an individual but a *tribal* one. And therefore we insist that to authorize purchase of such a claim could not repeal the prohibition of the Allotment Act, because that only affected *approved allotments*, i. e., the right held by an Indian individually. Also the Allotment Act had

no application to the Blackfeet Reservation at any time between the agreement of 1895 and the act of 1907 readopting its provisions for that reservation.

In insisting that the act of 1910 can not apply because it in turn would violate some treaty, as counsel reads it (brief, pp. 28–29), he asks this court to ignore the ordinary meaning of English words.

The *La Breche* case (their brief, pp. 23, 24) is not parallel. The lands had been *selected in 1909*, under the act of 1907, and had been allotted to the Indians by an allotting agent, but not confirmed. And the privilege gained under the act of 1907 was wholly unimpaired by contract or sale. The court found that plaintiffs had become *allottees and owners*. The Reclamation Service had attempted to dispossess plaintiffs without legal proceedings. (Copy of the decree will be found in the appendix hereto as Exhibit D.)

In *Leecy* v. *United States*, 190 Fed. 289, 293, there was no statutory authority of any sort under which the officers could justify their taking. They were simply violating the Allotment Act.

In *Porter* v. *Bishop*, 25 Fla. 749, no question of power to transfer the settler's privilege to enter was involved. The settler's right, if any she ever had, had long since been canceled.

II.

IF ANY SUCH CONSENT WERE NECESSARY, TRIBAL CONSENT TO SUCH USE HAD IN FACT BEEN GIVEN.

By the agreement of September, 1895, the tribe "*hereby granted*, for such purposes and under such rules * * * as the Secretary of the Interior may prescribe," the "right of way for railroads or

other highways, or telephone or telephone lines, *canals*, and irrigating ditches, through any portion of this reservation," "whenever in the opinion of the President public interests require" their construction. This agreement *was in effect the agreement of every member of the tribe*—the *Henkels among others.*

The earlier agreement of December, 1886, approved May 1, 1888, contained a like covenant, limited, however, to railroads, highways, and telegraph lines; and even the treaty of 1855 provided that the United States might "permanently occupy as much land" as might be necessary "to construct *roads* of every description." These two earlier agreements are referred to merely as indicating the tribal attitude toward public improvements generally. Public irrigation projects were then unknown. But by 1895 they had come to be recognized, as had the telephone. Hence their inclusion in the new agreement.

The suggestion that "canals" meant merely the *small* canals of private persons is opposed to both the letter and the spirit of the instrument. The previous agreements had dealt exclusively with *public utilities*—railroads, highways, and telegraph lines. This one added telephone lines, canals, and irrigating *ditches.* The first is a public utility, usually held in corporate ownership, as are canals also; while the words "irrigating ditches" were to cover the smaller channels usually owned by private persons. The Standard Dictionary defines "canal" as "an artificial waterway for inland navigation, *the con-*

veyance of water power, or *the irrigation of lands*," etc. "Canals" include appurtenant dams and reservoirs. (See cases cited under I–4, supra.) We can not assume that Congress would provide for a channel without any means of getting water into it.

To the suggestion that "canals" should be limited to those for use within the reservation, we answer: (1) There is no such limitation expressed in the act. *United States* v. *Portale*, 235 U. S. 27. (2) Plainly none such could have been intended as to railroads, telegraph, or telephone lines; and the words "through any portion of this reservation" must be given the same meaning as to canals, as in the case of railroads. And (3) the word "through" can not be distorted to read "from one point to another within."

This was a general grant of rights of way in futuro. Its language corresponds to that found in the general railroad right of way act of 1875 (18 Stat. 482); and it should receive a like construction. It provided for "float" rights of way—each subject to be anchored anywhere within the reservation, by (1) the President's opinion that the public interest required the construction, and (2) definition of right of way boundaries.

When the President approved the Reclamation Act for the construction of "irrigating works for the reclamation of arid and semi-arid lands" in Montana and elsewhere, he in legal effect expressed his opinion that the public interests required such construction. And he also expressed his opinion as to each project, through the Secretary, whom, by that act, he desig-

nated to decide on the advisability thereof. It will not be contended that the President must have personally investigated each canal. In such purely administrative functions he may employ any executive agency. *United States* v. *Birdsall*, 233 U. S. 234; *United States* v. *Ormsbee*, 74 Fed 209, 210.

Any identification of boundaries would pin the "float" to earth. Staking the ground, approval of maps, or location or actual construction would each suffice. *Jamestown & N. R. R. Co.* v. *Jones*, 177 U. S. 130, 131. As would also an order of withdrawal, *even though unauthorized* by the Reclamation Act. This because the question is of the completion of a grant under the 1895 agreement, and not of the application of a *special* power under the Reclamation Act.

While a power to "purchase" would carry a power to take by gift (*Thompson* v. *New York*, 3 Sandf. Ch. 625), the grant under the 1895 agreement was a purchase, paid for by money, live stock, and employment guaranteed therein.

It does not lie in the mouths of the Henkels to complain that the $7,500 was paid to their mother rather than held for the tribe; the tribe alone could complain of this. These lands were subject to disposal by Congress. They were lawfully appropriated to this Milk River project, with the tribal consent, which was also the consent of the Henkels.

It remains but to consider the effect of the allotment acts.

III.

AS INDIVIDUALS, THE HENKELS NEVER HAD ANY INTEREST IN THIS LAND.

Granting that the general Allotment Act, as amended in 1891, applied to the Blackfeet Reservation until the agreement of 1895, there had been no Presidential order for either survey or allotment, and of course no selection or approval of allotments. The act did not pretend to vest any interest *in any specific tract in any* individual Indian previous to actual allotment.

In this situation a new agreement was made whereby *during its existence* (at least until 1908) no allotments should be made, and then and thereafter the lands should be held as a communal grazing tract until a majority of the adult males should in writing request that allotments be made. This to the end that the members of the tribe—including the Henkels—might be assured of enduring range for their herds, which they were forbidden to sell. This agreement withdrew that reservation from the influence of the Allotment Act.

Thus stood the case in 1903, at the time of the first withdrawal, and in 1906, and February, 1907, when the sale contracts were made. It is true that the proviso of Article V of the 1895 agreement prescribed the mode of securing a preferential claim to land occupied and fenced with the agent's approval, in the event allotments should ever be authorized on the reservation. The proviso is of no moment here, however, because: (1) No description of land or improvements was ever filed with the agent. (2) Ten

tribal family members would have been necessary, as it does not appear that the land was *solely valuable* for grazing. The filing must have been either a single one for the family or separate filings made for each member by the head. In the former case payment to the mother would have been a payment to the family, while in the latter the particular 80 or 160 acres claimed by each member, as well as the improvements claimed by each, would have been declared, so that the Government would have known whether to have paid the $7,500 to the family or its members, thus escaping the present claim that it did not reach the daughters, and that the Indian mother could not and did not represent them. (3) A contingent selection privilege, unattached to any land, is a mere personal privilege, not related to realty. It can not, any more than can the tribal right of occupancy, affect the Government's power to use the land. If the allotment acts had all been repealed in February, 1907, no one not then holding a selected allotment would have had any claim against the United States on account of the cutting off of this inchoate privilege.

When the Government appropriated this land, the reservation stood as if no allotment acts had ever been passed. The Henkels had no personal claims therein, either under those acts or the agreement of 1895. Theirs was a mere tribal occupancy, with improvements. If this be true, as plaintiffs in error virtually concede (this brief, I, 2, *supra*), it necessarily follows that the tribe *alone* can complain of

the appropriation of that occupancy or the land to which it appertains, to governmental use.

The United States had become the beneficiary of the "canal" right of way under the 1895 agreement and, having the superior right, was entitled to judgment. The judgment was for the land alone (R. 35). The averments of right of possession and wrongful withholding, as well as the prayer of the complaint, were limited to the land (R. 5, 6). No relief was sought or awarded as to the personalty.

IV.

THE IMPROVEMENTS.

For the reason last stated they are not in this case.

When the Henkels began to improve this land under mere tribal occupancy they knew they were risking tribal agreement and Congressional action. If appurtenant to the land, the improvements follow it, and, had there been neither trading nor payment, the Henkels would be left with a moral claim which Congress alone can recognize. It is able to fully investigate the merits, and decide whether the daughters really joined in sale or acquiesced or received their share of the $7,500 paid. If the daughters' contention were sound, this would be their exact position. If viewed as personalty, the judgment here has not disposed of improvements, nor may the right thereto be here determined. Whether personalty or fixtures, the mother, as the head of the family, was the one to claim them under the agreement of 1895.

Could the court determine ownership, it would turn on the power of the Indians to sell and of the United States to buy. This power will now be considered.

V.

IF THEY HAD ANY CLAIM, THEY HAD LAWFULLY RELINQUISHED IT TO THE UNITED STATES.

(a) They had power to convey to the United States.

Before the discovery of America the Indian's power to sell or trade was absolute. The doctrine of "title by discovery" simply forbade (on principles of public policy) their alienating the resultant tribal occupancy right *to anyone save the United States.* (See cases cited I–1, 2, *supra.*) Until prohibited by some statute, an Indian could sell any property right to another Indian. *Williams* v. *Bank,* 216 U. S. 582, 598; *Blocker* v. *McClendon,* 98 S. W. 166.

The latter case is a parallel one. Plaintiffs—Choctaw Indians—had bought the occupancy and improvements of other Indians on an unallotted tract within the Chickasaw Reservation, having only this paper title. They sued in ejectment other Indians in possession, who were claiming the land. The case was decided in their favor by the Court of Appeals for the Indian Territory, a tribunal referred to by this court in *Williams* v. *Bank, supra,* as specially competent to pass on such a question.

Plaintiffs in error concede that Indian may sell to Indian tribal occupancy and improvements, in the following language (their brief, p. 10):

> It is not to be understood that the plaintiffs in error dispute the proposition that one

> Indian, entitled to tribal rights on a reservation, may buy out the improvements of another, and, surrendering the possession to the other, would lose his right thereafter to select the land thus theretofore occupied by him.

There never was, by doctrine, statute, or otherwise, any restriction upon the power of the Indian to relinquish or sell his interest in real or personal property *to the United States*. In many cession agreements ratified by Congress provision is made for exchange of land in favor of some individual Indian. Plaintiffs in error also concede the Indian's power to so relinquish, provided it be for a use consistent with reservation purposes (their brief, p. 18) in the following language:

> So, while it may be true that an Indian may relinquish to the General Government his preference right to a particular tract within a reservation, in order that it may be devoted to some use consistent with that for which the reservation was created, etc.

The contention of plaintiffs in error that an Indian can not convey his pre-allotment privilege to the United States, is bedded on the assertions (1) that the general Allotment Act of 1887 always applied to the Blackfeet Reservation; (2) that the prohibition against conveyance in that act applied to the pre-allotment privilege as well as the allotment itself (their brief, p. 10); (3) that the privilege of conveyance given by the later act of 1906 does not apply to pre-allotment privilege (their brief, p. 16); and

(4) that the last-named act does not apply because this land is not within a reclamation project. (Their brief, p. 14.)

The Government disputes each of these contentions.

(b) The Allotment Act prohibition does not apply.

This is so because: (1) That act was not operative as to the Blackfeet Reservation in 1906 or February, 1907 (III, *supra*). (2) It was not aimed at relinquishments of improvements or selection privileges, either preferential or of allotment to the United States. Such a relinquishment would not increase the number of allotments or give any allotment to other than an Indian. (3) The prohibition by its terms reached only "conveyances of" or "any contract made touching lands set apart and allotted." Until then there was nothing to be conveyed, since there was nothing finally attached to any specific lands. The inchoate privilege was a *personal* one only, and no third person would pay money for that which would become valueless in his hands.

(c) The same language respectively in the Allotment Act and the act of June 21, 1906, must be given the same meaning.

If we read the words "lands set apart and allotted" in the prohibition clause of section 5 of the Allotment Act as reaching out to the occupancy privilege prior to allotment selection, equally must we read the words "allotted lands" in the act of June

21, 1906, permitting alienation as likewise reaching out to that occupancy privilege; or, if we read the former as limited to allotments selected and approved, equally must we so read the latter.

The result is that if the prohibition be held to apply to the earlier occupancy privilege, that prohibition is neutralized, in the case of lands within any approved reclamation project, by the later act of June 21, 1906, permitting the alienation of the same lands. This is the meaning claimed for the act of 1887 by counsel for plaintiffs in error. (Their brief, p. 10.)

If, on the other hand, we read the act of 1906 permitting alienation as being restricted to allotments actually made (as do plaintiffs in error; their brief, p. 16), then, giving the same reading to the prohibition of the Allotment Act, there is no prohibition against the alienation of the occupancy privileges and the improvements. *Williams* v. *First National Bank*, 216 U. S. 582, 597–598; *Thomson* v. *McLaughlin*, 103 S. W. 595, 598, quoted approvingly in the Williams case. Here the Secretary's approval met every prerequisite to a valid conveyance required by the act of 1906.

(d) There was here an absolute right to condemn any interest or right, if any, held by any Indian.

This is so whether the right was before or after selection and approval of the allotment. Section 7 of the reclamation act provides that—

> Where in carrying out the provisions of this act * * * it becomes necessary to ac-

> quire *any rights or property*, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation, etc.

And section 10 of the allotment act expressly subjects every interest thereby created to the right of eminent domain.

Wherever a right or interest can be secured by condemnation, the person holding or claiming that interest, despite any general statutory prohibition of conveyance, may always voluntarily convey to the person who could condemn. This is an implied necessary exception, to avoid forcing the parties into needless litigation. *Northern Pacific Ry. Co.* v. *Townsend*, 190 U. S. 267, 272; *Northern Pacific Ry. Co.* v. *Ely*, 197 U. S. 1, 5.

(e) The Secretary had the power to buy.

Section 7 of the Reclamation Act, last quoted, of itself establishes this power. In addition, section 10 of the same act empowers him to "perform any and all acts necessary and proper to carry the provisions of this act into full force." This question has been discussed at length, *supra*. He could buy anything they could sell.

(f) The case of the two daughters.

In *Lamb* v. *Davenport*, 18 Wall. 307, 314, the court said:

> The right of the United States to dispose of her own property is undisputed, and to make *rules* by which the lands of the Government

may be sold or given away, is acknowledged, * * * etc.

The Allotment Act lodges the right and duty of selection for "minor children" in the "head of the family." Article V of the 1895 agreement requires each tribal member to file the descriptive list of occupancy not only for himself but for the *"members of his family," whether minors* or *adults.* The mother is the head of this Indian family. *Hy-Yu-Tsi-Mil-Kin* v. *Smith,* 194 U. S. 401, 403, 414. The answer avers that plaintiffs in error were all members of one family. So that the mother alone on the Blackfeet Reservation could claim the specific contingent selective privilege under the agreement of 1895 for each member of that family regardless of minority.

The selection of *allotment* would depend on minority. Plaintiffs in error do not allege in their affirmative answer that the daughters were adults. Desiring the benefit of that fact, if material, they should have alleged it if it were a fact. The sons acted for themselves. Every presumption must be indulged in to support this judgment. This and the further presumption that official duty (the purchase by the Secretary) was regularly performed, requires that they be viewed here as minors, if necessary.

The Interior Department, in fact, so treated them. (Exhibit C to this brief.)

How could a State exercise power of guardianship over Indian children and their property, carrying, as it would, control of their person and right of disposition of their property? The Constitution lodge

this power in Congress. Congress has provided (sec. 441, Rev. Stat.):

> The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: * * *.
> Third. The Indians.

And section 463, Revised Statutes, gives the Indian Commissioner, subject to control of the President and the Secretary—

> management of all Indian affairs and of all matters arising out of Indian relations.

It would seem that these officers have been given the sole power to select *personal representatives* for minor Indian children, and they do this under the same power that enables them to *select* attorneys for adult Indians.

The regulations of the Interior Department governing changes in allotments under the act of March 3, 1909 (35 Stat. 784), provide:

> The interests of living minors, whether in their own allotments or those inherited, *must be relinquished by their natural guardians as such.* (38 L. D. 45.)

Similar regulations were in effect when the Interior Department had sole jurisdiction of all such claims both prior to selection and during the trust period of allotments. At that time (before 1894) no court had any jurisdiction in the matter. *McKay* v. *Kalyton*, 204 U. S. 458. The Interior Department has always had power to make regulations not inconsistent with law concerning the Indians and their affairs and allot-

ments. And its regulations have always conformed to the one last quoted. The *uniform practice* of that department has been to deal with the *Indian parent* as to the interests of minor children. And so it is that all treaties or agreements with the Government are signed by the *adult* members of the tribe only. By the act of June 25, 1910 (36 Stat., 855), Congress, as it had the power to do, withdrew determination of the question of heirship in case of deceased allottees during the trust period from the courts, and lodged this function with the Secretary of the Interior. *Bond* v. *United States*, 181 Fed. 613; *Pel-ata-yakot* v. *United States et al.*, 188 Fed. 387. A notable example of such departmental action is presented by the sale of inherited Kiowa, Comanche, and Apache allotments to the United States for the purposes of reallotment under the acts of June 25, 1910 (36 Stat. 856), and June 30, 1913 (38 Stat. 94), amending 37 Stat. 534. By departmental order of November 29, 1913, interests of minor heirs were to be relinquished to the United States by their *natural* guardians, and the supplemental regulation of March 11, 1914, approved March 14, 1914, provides for the payment of the money of a minor to his or her parent. The material portions of these orders read as follows:

> November 12, 1913: * * * The interests of minor heirs are to be relinquished by the natural guardians. The superintendent will sign for minors without natural guardians.

> March 11, 1914: * * * A disbursing officer may pay to a minor or his parent, custodian, or guardian * * * sums (etc.) * * *. No funds belonging to minors who are not in regular attendance at school shall be paid to them or their parents, etc., except under approved authorization on Form 5–139.

(NOTE.—The reference to *guardian*, other than parent, in the last order is explained by the fact that the Five Civilized Tribes had their own tribal courts, and the fact that the minor children of emancipated Indians—that is, those who have become citizens and whose lands are not restricted—would be subject to the control of probate courts of State jurisdiction.)

This question was raised by the Treasury Department in connection with the very settlement involved in this case and with others made at the same time, and was resolved by the Indian Department, according to its usual practice, by commissioner's letter of July 11, 1907, which is printed as Exhibit C to this brief.

Should the presumption of minority not obtain and the case turn, as to the daughters, on that question, it would be necessary to take proof.

CONCLUSION.

It is submitted:

(1) The United States could and did appropriate this land to project uses.

(2) None save the tribe could complain of this action and it could complain only to Congress.

(3) The tribe had granted a right to so use it, which grant was also the grant of the Henkels as members of the tribe.

(4) The Henkels had the power to relinquish, as the Government had the power to take their relinquishment, and each did so.

(5) The question of improvements is not before the court.

(6) The judgment below should be affirmed.

WILLIAM WALLACE, Jr.,
Assistant Attorney General.

JANUARY, 1915.

APPENDIX.

EXHIBIT A.

DECEMBER 20, 1902.

The Honorable SECRETARY OF THE INTERIOR.

SIR: The reservoir for the St. Mary project in Montana is located partly within the Blackfeet Indian Reservation and partly within the Flathead Forest Reserve.

No entries are allowed within an Indian reservation, but under the law mining claims may be taken up within a forest reserve. In order to prevent claims being taken so as to interfere with the proposed use of the St. Mary Lakes for reservoir purposes, it is requested that a suitable reservation be made to preserve it for such use.

The lands along the lakes have not yet been covered by the public-land surveys, nor has the water line of the proposed reservoir been accurately determined. It is the intention during the next season to survey the water line, at which time a definite description can be given, but in the meanwhile it is desired that a strip of land one-half mile wide along the water lines of the upper and lower St. Mary Lakes and one-half mile on each side of the stream joining the lakes be withdrawn from public entry, as authorized by section 3 of the act of June 17, 1902 (32 Stat.

388), "for any irrigation works contemplated under the provisions of this act." It is understood that this language of the act authorizes the withdrawal of lands for this purpose from entry of any kind.

Very respectfully,

CHAS. D. WALCOTT,
Director.

EXHIBIT A–2.

DEPARTMENT OF THE INTERIOR,
Washington, February 28, 1903.

The DIRECTOR OF THE GEOLOGICAL SURVEY.

SIR: In compliance with the recommendation in your letter of December 20, 1902, I have in a letter of to-day to the Commissioner of the General Land Office directed the temporary withdrawal of the public lands in Montana in the areas mentioned around the upper and lower St. Mary Lakes and on each side of the stream connecting them, from any public entry whatever, under the first form of withdrawal mentioned in section 3 of the act of June 17, 1902 (32 Stat. 388).

This withdrawal is made in connection with the reservoir for the St. Mary project.

Very respectfully,

E. A. HITCHCOCK,
Secretary.

EXHIBIT B.

SEPTEMBER 15, 1911.

The Honorable the SECRETARY OF THE INTERIOR.

SIR: I have the honor to recommend that the following described lands within the Blackfeet Indian Reservation, Montana, excepting any tracts the title to which has passed out of the United States, be reserved from location, entry, sale, allotment, or other appropriation as provided in section 13, act of June 25, 1910 (36 Stat. 858), and that all withdrawals and reservations for reclamation purposes heretofore made of lands within the said Blackfeet Indian Reservation be ratified, confirmed, and extended to cover the lands herein described.

(Here follows a long land description, including these described in the answer in this case.)

Very respectfully,

J. M. MCKINNEY,
Acting Director.

SEPTEMBER 16, 1911.

The lands described are hereby reserved as recommended, and the Commissioner of the General Land Office will cause the records of his office and the local land office to be noted accordingly.

SAMUEL ADAMS.

(Samuel Adams, Acting Secretary.)

Exhibit C.

Department of the Interior,
Office of Indian Affairs,
Washington, July 11, 1907.

The Auditor of the Treasury
for the Interior Department.

Sir: On May 9, 1907, the Director of the Reclamation Service forwarded to this office relinquishments of James H. Housman and family, Rachel Norris and children, and Caroline Henkel and family, covering lands in or near the Blackfeet Indian Reservation, Montana, required in connection with the St. Mary irrigation project. These relinquishments were approved by the Secretary of the Interior, and on May 3rd this office returned them to the Reclamation Service for transmission to the Treasury Department for payment.

I am now in receipt of a letter from the Acting Director dated July 9, in which he says that he is informally advised by your office that sufficient showing did not accompany the relinquishments as to the legal right of Indian adults to sign the relinquishments of their children in the allotments of land made to them by the United States.

As to this objection, you are informed that the relinquishments and accompanying papers were examined carefully by this office and found to be sufficient in form and substance to constitute a complete and valid relinquishment to the United States of any and all interests which the parties had in the

lands covered thereby, which finding was approved by the Secretary of the Interior.

It is respectfully submitted that this action should be accepted by the accounting officers.

However, I may add that the lands had not been allotted to the Indians but were merely selections for allotment which might or might not have been confirmed to them had they not relinquished. They undoubtedly had an equitable title in the improvements and a right to hold the lands, but did not have such legal right as would require conformity to the State laws regarding transfers of title in order to divest them of their rights.

The office and the department have uniformly held in such cases that the natural guardian can execute a valid relinquishment in behalf of his minor child. Moreover, the probate courts of the State have no jurisdiction of the Indians of the Blackfeet Reservation, and the appointment of legal guardians would be impracticable, even if it were necessary.

The office is in receipt of information from the agent that these Indians are anxiously inquiring about the payment, as they are desirous of making new locations and putting up buildings on them.

I trust you may be able to see your way clear to allow the payment of the sums due at an early date.

Very respectfully,

C. F. LARRABEE,
Acting Commissioner.

Exhibit D.

In the District Court of the United States, District of Montana. *David La Breche and George W. Cook, plaintiffs,* v. *United States of America and J. N. Savage, defendants.*

DECREE.

This cause came on to be tried before the court and heard on the —— day of ———, 1913. Evidence was thereupon introduced by the respective parties, and the case was argued by counsel and taken under advisement by the court, and thereupon, upon consideration thereof, it was and is now ordered, adjudged, and decreed as follows, to wit:

That the plaintiff, David La Breche, in or before the month of July, 1909, settled upon and duly made selection for allotment of lots one (1) and two (2) in section thirty-four (34) north of the Principal Montana Base, and in range thirteen (13) west of the Montana Principal Meridian, and duly became the allottee and owner thereof, and that he was at the time of the commencement of this suit, and is now, the owner of the said premises and entitled to the occupancy of the same without interference on the

part of said defendants or anyone acting in their behalf, and that he is entitled to letters patent for said premises, as provided by law in such cases; (Here was provision as to *Ward*) * * *

That the said plaintiffs are also the owners of the sawmill and other improvements placed by them on said premises.

○